Supreme Court of the United States

OCTOBER TERM, 1942.

No.

AMERICAN SCOTTI CORPORATION and S. A. SCOTTI & C. OF MONZA, ITALY,

Petitioners,

—against—

HENRY POLLAK, INC.,

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the Court at Special Term in denying petitioners' motion for judgment on the pleadings was not reported but is printed as Appendix B hereto (pp. 31-34).

The opinion of the Court at Special Term in granting judgment for the respondent herein was not reported but is printed as Appendix C hereto (pp. 35-36); Opinion of Mr. Justice Levy, Judgment Roll.

The Appellate Division in affirming said judgment delivered no opinion, and no opinion was delivered by either the Appellate Division or by the Court of Appeals in denying petitioners' motion before each of said Courts, respectively, for leave to appeal to the Court of Appeals.

Basis for Jurisdiction.

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth on page 1 of the foregoing petition and is, by reference, adopted as part of this brief.

Statement.

The material facts have been set forth in the Summary Statement at pages 2 to 6 of the preceding petition and such statement is, by reference, adopted as part of this brief.

Argument.

POINT I.

The decision of the State Court is at variance with the decisions of this Court holding invalid assignments of the nature involved in the instant case.

(a)

This Court has repeatedly held that any purely voluntary transfer or assignment of an unliquidated claim against the Government, such as that relied on herein, is absolutely null and void.

United States v. *Gillis*, 95 U. S. 407;
Spofford v. *Kirk*, 97 U. S. 484;
Hager v. *Swayne*, 149 U. S. 242;
Nutt v. *Knut*, 200 U. S. 12;
National Bank of Commerce v. *Downie*, 218 U. S. 345.

In *Spofford* v. *Kirk*, 97 U. S. 484 and *Hager* v. *Swayne*, 149 U. S. 242, the Court pointed out the mischiefs which the statute was designed to prevent.

The case most frequently cited under the statute is that of *National Bank of Commerce* v. *Downie*, *supra*. In concluding that the assignments then before the Court were in direct opposition to the Statute, Mr. Justice Harlan referred with approval to the language of the Court in *Spofford* v. *Kirk*, 97 U. S. 484 and added at pages 356-357:

> "If any regard whatever is to be had to the intention of Congress, as manifested by its words,—too clear, we think, to need construction,—we must hold such a transfer to be absolutely null and void, and as not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred. * * * Any other holding will effect a repeal of the statute by mere judicial construction in disregard of the plain, unequivocal intent of Congress, as indicated by the Statute".

(b)

Respondent has apparently urged with success in the Court below that, the refunds having already been paid by the Government, the assignment in suit was valid as between the parties.

If this was the ground upon which the lower Court based its holding, then the same is at variance with prior decisions of this Court where such an assignment was held ineffectual even though the Government had already paid the claims.

Spofford v. *Kirk*, 97 U. S. 484;

National Bank of Commerce v. *Downie*, 218 U. S. 345.

In *Spofford* v. *Kirk*, *supra*, the assignee made the contention that, once the fund was paid over, the assignee acquired an equitable lien on the proceeds. This contention was noted by the Court and expressly rejected.

POINT II.

The decision of the lower Court is at variance with the previous decisions of the highest Court of New York State.

Prior to this Court's decision in *National Bank of Commerce* v. *Downie*, the New York Court of Appeals had held in the case of *York* v. *Conde*, 147 N. Y. 486, that an informal assignment, though unenforceable as against the Government, was nevertheless effectual as between the parties. Following the *National Bank of Commerce* v. *Downie* case, however, the Court of Appeals unconditionally adopted this Court's construction of the statute to the effect that, even as between the parties, informal assignments of Government claims were null and void.

Manhattan Commercial Co. v. *Paul*, 216 N. Y. 481; *Levinson* v. *Illinois Surety Co.*, 222 N. Y. 280.

In the *Manhattan Commercial Co.* case the Court, referring to *National Bank of Commerce* v. *Downie*, said:

> "We accept said decision as an authority and, controlled by it, hold that the present assignment or transfer or authorization was likewise null and void" as between claimant and assignee and did not vest in the assignee "any right whatsoever, legal or equi-

table, to the moneys paid by the United States on the claims".

The Court of Appeals closed its decision with the statement:

> "* * * the language of the statute and of the opinion in the *National Bank of Commerce* case interdicts further discussion".

In *Levinson* v. *Illinois Surety Co.*, the Court, in likewise holding the assignment there involved to be void under the statute, referred to its previous decision in the *Manhattan Commercial Co.* case, and again cited *National Bank of Commerce* v. *Downie*, and at page 287 added:

> "All rights therefore, legal or equitable, arising from the assignment made by Vermilye & Power to the plaintiffs are as if such assignment had never been executed and delivered".

It is to be noted that when each of these controversies came before the Court the claims had been paid and the Government had been discharged from all liability.

The decision of the Court below is also contrary to the latest pronouncement by the Court of Appeals on Section 3477, contained in *McKenzie* v. *Irving Trust Co.*, decided on April 13, 1944 (292 N. Y. 348). That decision was handed down subsequent to the affirmance by the Appellate Division of the judgment in the instant case. The *McKenzie* case dealt with the 1940 amendment to R. S. 3477.

The point there involved was whether the Trust Company in taking an assignment of United States Government claims as security for advances of $150,000 had made timely compliance with certain conditions which the amendment had imposed on the validity of the assign-

ment. The Court of Appeals decided in favor of the Trust Company. The Court, however, expressed its adherence to prior precedents by stating that the assignment to the Irving Trust Company "would undoubtedly have been absolutely 'null and void' if the Statute had not been amended on November 7, 1940" (pp. 353-354).

The holding of the State Court, therefore, in giving effect to the assignment in suit, was inconsistent with the prior decisions of the highest Appellate Court of the State of New York, and with the very recent decision of that Court in the *McKenzie* case.

POINT III.

The Court below has misinterpreted and misapplied the decision of this Court in *Martin* v. *National Surety Company,* 300 U. S. 588.

The State Court, in giving effect to the assignment herein, contrary to the cited statutory provisions, has apparently adopted respondent's contention that the effect of the *Martin* case was to overrule *National Bank of Commerce* v. *Downie.* It is submitted that no such effect is attributable to the decision in *Martin* v. *National Surety Company.*

As a matter of fact this Court stated in so many words that its opinion in the *Martin* case was to be "kept within the strict necessities of the specific controversy" there involved (p. 593).

The specific controversy referred to arose out of a Government contract, where laborers and materialmen remained unpaid, and where the fund which should have been devoted to their payment had, through unconscionable conduct, been appropriated by Martin.

The Court was seeking to prevent a fraud, and it accordingly invoked every equitable principle for the benefit of unpaid laborers and materialmen and found an equitable lien to have been created in their favor by an assignment which the contractor had given to the surety company. That this is the basis of the Court's decision appears from the following (p. 595):

> "If the Government has any interest in the outcome of this controversy it is in sustaining the assignment to the surety rather than destroying it. The contractor undertook that materialmen would receive their money promptly while the work was going on. In failing to pay them, he violated a duty to them, but a duty also to the Government, for the default was a breach of the condition of the bond. If the assignment to the surety creates a lien upon the fund, the contractor will be compelled to fulfill the duty thus assumed."

Further to limit the extent of its holding, the Court then went on to say:

> "A different question would be present if the surety was seeking to keep the money for itself."

The Courts have frequently recognized the moral obligation of the United States in public contract cases to see that laborers and materialmen are paid for their services and materials.

Henningsen v. *U. S. F. & G. Co.*, 208 U. S. 404;
Belknap Hardware Mfg. Co. v. *Ohio River Contract Co.*, 271 Fed. 144 (C. C. A. 6th);
Prairie State Bank v. *U. S.*, 164 U. S. 227;
American Surety Co. v. *Westinghouse Elec. Mfg. Co.*, 296 U. S. 133;
Riverview State Bank v. *Wentz*, 34 Fed. (2d) 419.

It is clear that in the *Martin* case this Court was not dealing with an ordinary assignee, as in the instant case, but with an assignee whose rights, under the particular circumstances there involved, were coextensive with the moral obligation of the Government. As the Court said at page 597:

> "Far from defeating or prejudicing the interests of the Government, the recognition of the equities growing out of the relation between the contractor and the surety will tend, as already has been suggested, to make those interests prevail."

It is submitted, therefore, that the decision in the *Martin* case was intended to be confined within the narrow compass outlined above and that the lower Court erred in interpreting it as overruling *National Bank of Commerce* v. *Downie*.

POINT IV.

This Court should determine the question here presented in order to remove the existing uncertainty and confusion in the State and lower Federal Courts with respect to the interpretation of the *Martin* case.

In those cases where *Martin* v. *National Surety Company* has been applied to situations involving Government contracts, no uncertainty or confusion arises. To such cases the language of the decision therein has direct application and is uniformly cited in support of the principle holding the proceeds of a public contract to be impressed with the equities in favor of laborers and materialmen. Among such cases are:

> *California Bank* v. *U. S. F. & G. Co.*, 129 Fed. (2d) 751 (C. C. A. 9th, 1942);

Maryland Casualty Co. v. *Lincoln Bank and Trust Co.*, 40 Fed. Supp. 782, 786 (Dist. Ct. W. D., Ky., 1941);

Century Cement Manufacturing Co., Inc. v. *Fiore*, 264 App. Div. 475, 479 (3rd Dept. 1942);

Hedley v. *New Amsterdam Casualty Co.*, 267 App. Div. 800 (4th Dept., 1943);

National Surety Corporation v. *Mass. Bonding and Insurance Co.*, 280 Ky. 785, 792 (1939).

In *Maryland Casualty Company* v. *Lincoln Bank and Trust Company*, *supra*, the Court laid stress in its opinion on the strict application which this Court's decision in the *Martin* case was intended to have.

The moment, however, that the *Martin* case is put to use in cases not involving Government contracts and involving ordinary assignments, such as the one at bar, a broadening field of conflict is encountered.

In some cases the *Martin* case is cited in support of the proposition that after payment of a Government claim, an informal assignment, otherwise void under the statute, may nevertheless be valid as between the parties. It is apparent that no such result could have been reached except in consequence of the Court's conclusion that *National Bank of Commerce* v. *Downie* was overruled by the *Martin* case:

Bank of California v. *Comm. Internal Revenue*, 133 Fed. (2d) 428, 432-433 (C. C. A. 9th, 1943);

U. S. v. *Certain Lands in Town of Highlands*, 49 Fed. Supp. 962, 965 (Dist. Ct. S. D. N. Y., 1943);

Rosecrans v. *Wm. S. Lozier, Inc.*, 142 Fed. (2d) 118, 124 (C. C. A. 8th, 1944).

In one case where *Martin* v. *National Surety Company* was cited, the Court even went so far as to say that the

statute has no application to transactions between private individuals. *Rosecrans* v. *William S. Lozier, Inc., supra.*

In two cases, involving ordinary assignments, the Courts reached diametrically opposite conclusions regarding the scope of this Court's decision in the *Martin* case:

> *In re Meadow Sweet Farms*, 32 Fed. Supp. 119 (Dist. Ct. W. D. N. Y., 1940);
> *In re Webber Motor Co.*, 52 Fed. Supp. 742 (Dist. Ct. D. N. J., 1943).

Re Meadow Sweet Farms, supra, involved assignments by a bankrupt of accounts receivable from the Federal Goverment as collateral security for loans. After the bankruptcy of the assignor, the assignee bank brought on a proceeding, claiming to be entitled to about $640 collected from the Government by the trustee in bankruptcy.

The Court held, in denying the application, that the assignments were void, even though they had been made for a present consideration, since they did not comply with the statutory provisions of Section 3477 of the U. S. Revised Statutes. Counsel for the trustee had contended, as do the attorneys for the defendant in the instant case, that the *Martin* case overruled *National Bank of Commerce* v. *Downie, supra.* In flatly rejecting that contention, Burke, *J.*, said:

> "* * * The decision here turns on the interpretation of the statute regarding assignments (*supra*). The Supreme Court held in *National Bank of Commerce* v. *Downie*, 218 U. S. 345, where the controversy as to the right to the fund was, as here, between a trustee in bankruptcy and a prior assignee, that assignments not in accordance with the statute were null

and void. In *Martin* v. *National Surety Co.*, 300 U. S. 588, the court announced a more liberal view of the statute under other circumstances, but did not overrule the *Downie* case. I think the *Downie* case must control."

In sharp contrast, is the case of *In re Webber Motor Co., supra.* The facts there were similar to those in the *Meadow Sweet* case but in the contest between the trustee and assignee, the finding was in favor of the assignee. The Court, after referring to *National Bank of Commerce* v. *Downie*, said at page 744:

> "The case upon which the Trustee primarily relies, *National Bank of Commerce* v. *Downie*, 218 U. S. 345, 31 S. Ct. 89, 54 L. Ed. 1065, 20 Ann. Cas. 116, would seem to support his contention, but it is our opinion that the broad construction therein adopted must yield to the limited construction adopted by the Supreme Court in the case of *Martin* v. *National Surety Company, supra.* The latter interpretation is clearly consistent with the language and purpose of the statute. Any distinction between the cases, which we should attempt to draw, would be tenuous".

To say that the distinction between the *Webber* case and *Martin* v. *National Surety Company* is tenuous, is equivalent to saying that the *Martin* case is to be given the broadest application as regards ordinary assignments, a construction which this Court's opinion in the *Martin* case expressly cautioned against.

On the other hand the Court of Claims has consistently followed *National Bank of Commerce* v. *Downie*:

> *Seaboard Air Line* v. *U. S.*, 53 Ct. Cls. 107, 113 (1918);

Packard Co. v. *U. S.*, 59 Ct. Cls. 354, 364 (1924);
Bolivar Cotton Oil Co. v. *U. S.*, 95 Ct. Cls. 182 (1941);
Severin v. *U. S.*, 99 Ct. Cls. 435, 442 (1943).

In *Bolivar Cotton Oil Co.* v. *U. S.*, *supra*, the Court quoted from Section 3477 and added, at page 187:

> "* * * The transfer here made was purely voluntary and therefore absolutely null and void under the statute. See *U. S.* v. *Gillis*, 95 U. S. 407; *Spofford* v. *Kirk*, 97 U. S. 484; *National Bank of Commerce* v. *Downie*, 218 U. S. 345".

It is apparent, therefore, that the *Martin* case has become the subject of conflicting interpretation to the prejudice of the orderly and uniform application of an important Federal Statute, creating a situation which calls for correction by the intervention of this Court.

POINT V.

The legislative history of the Assignment of Claims Act of 1940, amending Section 3477, indicates Congressional understanding that *National Bank of Commerce* v. *Downie* clearly represents the present state of the law under said section.

R. S. 3477 was first enacted in 1846. It has evidently been found to serve the public interest well, for Congress, except for the amendment noted below, has not seen fit to change it and has indeed reenacted it from time to time.

In 1940 Congress amended the Statute by enacting the Assignment of Claims Act of 1940 for the purpose of aiding the National Defense by facilitating the financing of war contracts. The amendment permitted the assign-

ment of Government claims to a limited class of assignees, namely, banks, trust companies and other financial institutions, upon compliance with certain conditions.

A hearing was held on the proposed bill (S. 4340) by the Senate Committee on Banking and Currency on September 14, 1940.

At this hearing and in the Committee Report (No. 2136) emphasis was placed upon the strict wording of Section 3477 and the strict construction it had received. *National Bank of Commerce* v. *Downie* was cited in this connection. No reference was made to *Martin* v. *National Surety Company* which had been decided in 1937.

On the floor of the Senate, Senator Barkley, who was in charge of the bill, made the following reference to Section 3477:

> "Under the present law contractors cannot even assign their contracts to anyone else * * *" (Cong. Rec. Vol. 86, Part II, p. 12803).

In the House the bill was referred to the Committee on the Judiciary. In reporting out the bill, the Committee stated (Report No. 2925, 76th Cong. 3rd Session):

> "Section 3477 of the Revised Statutes makes assignments of claims against the United States null and void unless they are made after the claims have been allowed and warrants issued. This latter statute is so strictly worded and has been so strictly construed that an attempted assignment which does not comply with the exact terms of the statute has been held void even as between the assignor and the assignee, so that it confers no rights in the assignee as against a trustee in bankruptcy of the assignor (*National Bank of Commerce* v. *Downie*, 218 U. S. 345)."

In explaining the measure on the floor of the House, Mr. Summers, Chairman of the Committee, said:

> "If this bill is not enacted there can be no assignment of claims, this is the first proposition * * *" (Cong. Rec. Vol. 86, Part II, p. 12557).

From the foregoing, the understanding of Congress clearly appears that informal assignments of Government claims are absolutely null and void as between assignor and assignee. Omission of any reference to *Martin* v. *National Surety Company* in the House Report or in the debates indicates that the strict rule of construction reiterated by this Court in *National Bank of Commerce* v. *Downie* has not been effected by the *Martin* decision.

It is submitted, therefore, that the enactment of the Assignment of Claims Act of 1940 had extreme significance. As this Court has several times lately observed resort may be had to such explanatory legislative history no matter how clear the words of the Statute may be.

Prussian v. *U. S.*, 282 U. S. 675, 678-679;
Harrison v. *Northern Trust Co.*, 317 U. S. 476, 479;
U. S. v. *American Trucking Association*, 310 U. S. 534, 543-544;
U. S. v. *Dickerson*, 310 U. S. 554, 562.

POINT VI.

The public interest and the interest of the Government will be promoted by prompt settlement by this Court of the questions here involved.

A logical extension of the holding of the lower Court in this case would, in the words of this Court in the *Downie* case, result in "a repeal of the Statute by mere judicial construction" (pp. 356, 357). It would open the door

to those evils which, as has been noted in this Court on several occasions, the Statute was designed to prevent (*Spofford* v. *Kirk*, 96 U. S. 484, 489-590).

More specifically with respect to the subject matter of this controversy, it would expose to the evils of free and marketable assignment millions of dollars worth of unliquidated claims filed every year by importers for the refund of customs duties erroneously exacted.

Furthermore, in view of the unprecedented number of Government contracts now outstanding, it is probable that the question here presented will arise in many cases involving claims under those contracts. For these reasons it is essential, in the public interest, that a final determination of this question be made at the present time.

Respectfully submitted,

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